Supreme Court, U.S.
FILED
AUG 28 1997
CLERK

No. 97-70

In The

Supreme Court of the United States

October Term, 1996

INTERNATIONAL FIDELITY INSURANCE COMPANY, a New Jersey Corporation,

Petitioner,

vs.

BOARD OF TRUSTEES OF OPERATING ENGINEERS LOCAL 825 FUND SERVICE FACILITIES,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Employee Retirement Income Security Act of 1974 ("ERISA") preempt provisions of the New Jersey Public Works Bond Act, N.J.S.A. 2A:44-143 to 147 (the "Bond Act"), a generally applicable state law that functions without any reference to ERISA, which law requires contractors to post bonds for payment for labor performed on public works projects, thereby rendering the issuing surety liable for unpaid pension fund contributions?

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RELEVANT STATUTORY PROVISIONS

The statutory provisions relevant to this matter include the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), *et seq.*, and the New Jersey Public Works Bond Act, N.J.S.A. 2A:44-143, *et seq.*

STATEMENT OF THE CASE

Respondent Board of Trustees of Operating Engineers Local 825 Fund Services Facilities (the "Trustees") are the Trustees of a union benefits fund, and are responsible to collect union benefit contributions (pension, welfare, medical, etc.) from employers of union laborers pursuant to Collective Bargaining Agreements.

Petitioner International Fidelity Insurance Company ("IFIC") issued Labor and Material Payment Bonds (the "Surety Bonds") to the employer-contractor on various public construction projects throughout New Jersey. The Surety Bonds required IFIC to "pay all lawful claims of subcontractors, materialmen, laborers, persons, firms or corporations for labor performed or materials, provisions . . . used or consumed" and "for labor, materials, or both, used or reasonable required for use in the performance of the contract . . ." in the event the employer failed to make such payments." Surety Bond ## 898727, 898730, 898687.

When the employer failed to make adequate benefit contributions for its union laborers, the Trustees instituted legal action against it and obtained a default judgment for $95,612.53. After an unsuccessful attempt to collect on its judgment, the Trustees instituted legal action against IFIC seeking payment for said contributions pursuant to the express terms of the Surety Bonds.

Issuance of and collection procedures against the Surety Bonds are regulated by the New Jersey Public Works Bond Act, N.J.S.A. 43:44-143, *et seq.* (the "Bond Act"). The Bond Act requires the public agent in charge of public works projects to require surety bonds to insure payment to all laborers and suppliers.[1] The New Jersey Supreme Court noted that the Act was designed to protect public agencies, laborers, and material suppliers who work on public projects from the insolvency of a general contractor. A-16. The court also noted the following with regard to the Bond Act:

— The Bond Act has existed in various forms for almost eighty years, long before congress adopted ERISA. A.16

— The Bond Act is a generally applicable law that functions without any reference to ERISA. A.16

— The Bond Act is both ERISA-neutral and union-neutral. A.15.

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1. The Bond Act, in pertinent part states:

> a. When public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the State or any county, municipality or school district thereof, the board, officer or agent contracting on behalf of the State, . . . shall require the usual bond as provided for by law, with good and sufficient sureties, with an additional obligation for the payment by the contractor, and by all subcontractors, for all labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or repair of such buildings, works or improvements.

N.J.S.A. 2A:44-143(a). A.32.

— The Bond Act does not frustrate ERISA's goal of uniform plan administration. A.16

— The Bond Act does not conflict with ERISA enforcement mechanisms A.16, and

— The Bond Act does not touch upon any of the rights or duties incident to ERISA plans. A.16.

Both the New Jersey Supreme Court and the Appellate Division below, recognized, as a matter of law, that the:

> surety bonds guarantee[d] both performance of the work and the full payment for labor and materials supplied on the jobs.

(A.3), and that coverage under the Surety Bonds included both wage and benefit elements of "labor." A.17-18, A.30. The New Jersey Supreme Court noted:

> [h]istorically, payments for all "labor performed" have been considered to include more than wages.[2] Sureties in New Jersey were aware of a practice of including fringe benefits within the definition of wages.[3]

A.17-18.

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2. Citing: *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957) (holding Miller Act provision insuring employer payment of "sums justly due" for labor performed not limited to wages).

3. Citing: *Newark Laborers' Pension-Welfare Funds v. Commercial Union Ins. Co.*, 126 N.J. Super. 1, 312 A.2d 649 (App. Div. 1973) (noting surety had paid benefit contributions owed, and holding that costs and attorney's fees were recoverable against surety in action to collect an employer's delinquent contributions).

In light of the undisputed state of the law, we object to IFIC's Statement of the Case that ". . . in order to prevail the Trustees must establish that the Bond Act requires the surety to guarantee direct labor expense and also any outstanding contributions owed to labor union pension funds" and that "the Union did not require Gram to furnish benefit bonds and thereby protect its members' interest in receiving the appropriate contribution." Petition ("Pet.") at p 3. We note however, that the parameters of coverage under the Surety Bonds is irrelevant for purposes of the preemption analysis in this case and has no bearing on this Court's consideration of Certiorari. Moreover, the parameters of coverage under the Surety Bonds is not truly in controversy. In this regard, the Appellate Division stated:

> It is disingenuous for the sureties to suggest that the only way the Union could have protected its members' right was for it to have purchased a fringe benefit bond. This may be necessary under some private employment bonds where the contractor is not statutorily required to obtain a surety bond for payment of all labor performed, but not under the statutory bond here under consideration. When the bond includes the total of the workers' wages, there is no reason to require a separate bond for a portion of the same.

(Footnote omitted). A.30.

IFIC filed a Motion to Dismiss the Complaint, alleging that the Federal Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* preempts the Bond Act, and prevents a surety from being liable for a contractor's delinquent payment of fringe benefit contributions. The Law Division granted IFIC's motion and dismissed the Trustees'

Complaint. On Appeal, the New Jersey Appellate Division, on February 20, 1996, reversed the Law Division and reinstated the Trustees' complaint. Upon Certification, the New Jersey Supreme Court on April 9, 1997, affirmed the judgement of the Appellate Division. After a thorough analysis of precedent, (A.5-16), the New Jersey Supreme Court held that "ERISA does not preempt suits by union trust funds against sureties that have issued bonds to employers for public works projects pursuant to the Bond Act." A-16.

The New Jersey Supreme Court's opinion follows this Court's recent decisions in *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) and *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, __ U.S. __, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (A.8-9, A.15-16) and is further supported by this Court's subsequent decision in *De Buono v. NYSA-ILA Medical and Clinical Services*, __ U.S. __, 117 S. Ct. 1747, 1752 (1997). The New Jersey Supreme Court's decision is consistent with numerous opinions from various United States Courts of Appeals as well as decisions from various state courts of last resort. A.10-13.

IFIC filed the instant Petition for a Writ of Certiorari alleging that the New Jersey Supreme Court misinterpreted *Travelers* and *Dillingham*, and misapplied decisions from the Second and Third Circuit Courts of Appeal and is in conflict with several Circuit Courts of Appeals. We submit that the New Jersey Supreme Court's decision was well-reasoned, properly decided, and presents no conflict warranting review on Certiorari pursuant to Rule 10 of the Rules of the United States Supreme Court.

REASONS FOR DENYING THE WRIT

I.

THE GRANTING OF CERTIORARI IS UNWARRANTED AS THE DECISION OF THE NEW JERSEY SUPREME COURT FOLLOWS DECISIONS OF THE UNITED STATES SUPREME COURT, AND IS CONSISTENT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS AND DECISIONS OF STATE COURTS OF LAST RESORT.

A. The New Jersey Supreme Court Correctly Followed *Blue Cross & Blue Shield Plans v. Travelers Ins., Co.*; *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*; and is Further Supported by *De Buono v. NYSA-ILA Medical and Clinical Services.*

After a thorough analysis of precedent on the preemption issue (A.5-16), the New Jersey Supreme Court held that ERISA does not preempt suits by union trust funds against sureties that have issued bonds to employers for public works projects pursuant to the Bond Act. The court's ruling followed the United States Supreme Court's recent decisions of *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct 1671, 131 L. Ed. 2d 695 (1995) and *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, __ U.S. __, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (A.8-9, A.15-16). The New Jersey Supreme Court's April 9, 1997 ruling is further supported by this Court's decision in *DeBuono v. NYSA-ILA Medical and Clinical Services*, __ U.S. __, 117 S. Ct. 1747 (1997), rendered on June 2, 1997.

When the United States Supreme Court reversed the Second Circuit in *Travelers*, it warned against taking the "relate to"

clause to "the furthest stretch of its indeterminacy" and held that generally applicable statutory surcharges which increased the costs of certain insurance and health care plans do not constitute a "connection with" employee benefit plans and do not trigger ERISA preemption. 115 S. Ct. at 1677. This Court emphasized a conservative approach to ERISA preemption by:

— warning against an over-expansion of ERISA preemption;

— underscoring that laws of general applicability do not trigger preemption;

— warning against finding preemption in areas of traditional state regulation; and

— finding that the basic thrust of the preemption clause was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.

115 S. Ct. 1674-1680.

In *Dillingham*, this Court held that ERISA did not preempt a California state statute permitting contractors to pay laborers enrolled in an apprentice program less than the prevailing wage. This Court emphasized that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. 117 S. Ct. at 838. In applying *Dillingham* to the case at bar, the New Jersey Supreme Court noted that both the California statute and the Bond Act were enacted before ERISA, and dealt with matters traditionally subject to local regulation. A.9. The California statute was one of general applicability, applying the same wage guidelines to apprenticeship programs regardless of the presence

or absence of an ERISA plan. Similarly, the Bond Act is one of general applicability. The New Jersey Supreme Court found it to be "ERISA neutral" and "union neutral" as its terms do not require the payment of fringe benefits. Rather, the contractor creates the obligation if he chooses employ union labor. A-15.

In the United States Supreme Court's subsequent visitation to the preemption issue, in *DeBuono,* this Court held that ERISA did not preempt a New York state tax on gross receipts for patient services at health care facilities, emphasizing that when a law "clearly operates in a field that has been traditionally occupied by the States," those seeking preemption "bear the considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law." *DeBuono,* 117 S. Ct. at 1752, *citing Traveler's,* 115 S. Ct. at 1674. This Court further stated that preemption was not warranted when the statute at issue was among "one of 'myriad state laws' of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute." *Id.* at 1752. This Court noted that the law at issue did not include a forbidden method of calculating pension benefits, did not require employers to provide certain benefits, did not contain provisions that expressly refer to ERISA or ERISA plans, and that the existence of a pension plan was not a critical element of the state law cause of action thereunder. *Id.*

In the context of the reasoning and guidelines set by *Travelers, Dillingham* and as affirmed by *De Buono*, the New Jersey Supreme Court made the following findings:

— the Bond Act was in a field traditionally regulated by the States and in fact "existed in various forms for almost eighty years, long before Congress adopted ERISA" A.16

— "The Bond Act is a generally applicable law that functions without any reference to ERISA." A.16; it is both "ERISA neutral" and "union neutral" A.15,

— "It does not frustrate ERISA's goal of uniform plan administration," A.16,

— "[it does not] make reference to ERISA", A.16.

— "[it does not] conflict with ERISA enforcement mechanisms" A.16, and

— "[it does not] touch upon any of the rights or duties incident to ERISA plans." A.16.

The New Jersey Supreme Court further noted that while the Bond Act may cause the cost of doing business in New Jersey to be different from the cost in other states, cost-uniformity was not an object of ERISA preemption. A.16.

Petitioner IFIC, in Point III of its Legal Argument, asserts that the New Jersey Supreme Court "misconstrued" this Court's holdings in *Travelers* and *Dillingham*, and attempts to distinguish these decisions by arguing that the Bond Act directly impacts the "funding and enforcement" of ERISA plans. Pet. 22-23. The New Jersey Supreme Court, however, expressly found otherwise: that the Bond Act **did not** frustrate ERISA's goal of uniform plan administrative (which would include funding) and that the Bond Act **did not** conflict with ERISA enforcement mechanisms. A.16. Petitioner IFIC cites to no decisions of this Court to support its legal conclusion, and we submit IFIC's argument is unfounded.

B. The New Jersey Supreme Court's Decision is Consistent With Decisions of the United States Courts of Appeals.

The New Jersey Supreme Court relied upon several decisions from the United States Courts of Appeals which analyzed the preemption issue in factual situations similar to the instant case. In *Greenblatt v. Delta Plumbing & Heating Corp*, 68 F.3d 561 (2d Cir. 1995), the guardians of a pension trust commenced legal action against a surety bond after the employer-contractor filed for bankruptcy. Finding the facts in *Greenblatt* substantially identical to the instant case, the New Jersey Supreme Court stated:

> The [Greenblatt] court found that New York common law concerning surety liability did not mandate employee benefit structures or provide alternate enforcement mechanisms that would trigger preemption under *Travelers*. New York surety law made no reference to ERISA, did not conflict with any ERISA enforcement mechanism, did not touch on any of the rights or duties incident to the ERISA plan, and did not conflict with any cause of action under ERISA.

A.10, citing *Greenblatt*, 68 F.3d at 574-75. The New Jersey Supreme Court further noted that the Trustees' claim against IFIC was a common state law action:

> The union's cause of action against the surety on the bond is "but a 'run-of-the-mill' state law claim," similar to a tort or contract action.

A.10, citing *Greenblatt*, 68 F.3d at 574.

Recognizing that Greenblatt involved a common law cause of action, the New Jersey Supreme Court also cited to *Bleiler v. Cristwood Constr., Inc.*, 72 F.3d 13 (2d Cir. 1995) and *Local 46, Metallic Lathers Union v. Trataros Constr., Inc.*, 920 F. Supp. 55 (S.D.N.Y. 1996), which cases applied *Greenblatt* and *Travelers* to a claim against a surety bond issued pursuant to a public bond statute similar to the Bond Act. The New Jersey Supreme Court rejected IFIC's attempt to distinguish its liability under a surety bond issued to a contractor on a private project and its liability under a similar bond issued to a contractor on a public works contract pursuant to state statute, stating:

> We find the distinction unconvincing. ERISA does not make such a distinction, and the analysis of the federal courts does not turn on the possible difference between a publicly-required bond and one entered into voluntarily.
>
> The lawsuits are common-law actions on contracts the employer made as a condition for obtaining a public construction contract. They do not represent actions that undermine the set of remedies ERISA provides to beneficiaries under its "comprehensive Civil enforcement scheme."

(Citations omitted) (A-14).

The above Second Circuit decisions are consistent with decisions from the Third Circuit, also noted by the New Jersey Supreme Court. In *Ragan v. Tri-county Excavating, Inc.*, 62 F.3d 501 (3d Cir. 1995), the Third Circuit rejected the surety's preemption argument, thereby permitting the administrator of benefit funds to pursue a state action against a surety under a

surety bond. The Third Circuit characterized causes of action against the surety bond as "generally applicable" laws that make no reference to ERISA plans, were not predicated on the existence of an ERISA plan, and indeed function irrespective of the existence of an ERISA plan. *Ragan*, 62 F.3d at 511; *See United Wire v. Morristown Memorial Hospital*, 995 F.2d 1179, 1192-1193 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 382, *reh. denied*, 114 S. Ct. 651 (1993).

The Third Circuit in *Ragan* also addressed and rejected the "funding" theory advanced by IFIC in the instant case. In this regard, the Third Circuit stated:

> Here, the district court need only determine [the surety's] obligations under the Bond. It need make no inquiry into the validity or status of the funds (or indeed whether they are ERISA funds), nor need it explore [the surety's] motives regarding employee benefits. The fact that the claimant under the bond happens to be an ERISA fund is not the kind of "critical factor in establishing liability" that prompted preemption. . . .
>
> . . . Simply because the sums collected may ultimately feed into an ERISA-governed fund does not in itself mean that the cause sued upon creates rights or restrictions which are "predicated on" the existence of an ERISA plan.

Ragan, 62 F.3d at 511. *See Dillingham*, (California statute permitted contractors to pay laborers enrolled in an apprentice program less than the prevailing wage); *Keystone Chapter, Associated Builders & Contractors, Inc. v. Foley*, 37 F.3d 945

(3d Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1393, 131 L. Ed. 2d 244 (1995) (Pennsylvania's State Commissioner prescribed minimum wages and benefits paid to both union and non-union laborers on public works projects.) (Under IFIC's "funding theory" the statutes of *Dillingham* and *Keystone* certainly would not survive a preemption analysis as they directly affect monies which may go into an ERISA funds; as laws of general applicability, however, the statues did not trigger preemption.)

Petitioner IFIC, in its efforts to find a conflict among the Federal Circuit Courts, cites to decisions from the First, Second, Fifth and Ninth Circuits.[4] Admitting that these cases are distinguishable from the case at bar by the fact that the statutes therein **expressly referred to ERISA plans**, IFIC asserts that preemption was found for the independent reason that such laws provide an alternative cause of action for the collection of ERISA contributions thereby infringing upon ERISA's enforcement mechanisms. From this premise, IFIC concludes that a conflict exists between these cases and the cases relied upon by the New Jersey Supreme Court.[5]

We submit that the alleged conflict is contrived. First, state statutes with **express reference to ERISA plans** have

4. *Williams v. Ashland Engineering Co., Inc.*, 45 F.3d 588 (1st Cir.), *cert. denied*, __ U.S. __, 64 U.S.L.W. 3229 (1996); *Sturgis v. Herman Miller Inc.*, 943 F.2d 1127 (9th Cir. 1991); *Iron Workers Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir. 1990); *McCoy v. Massachusettes Institute of Technology*, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992); *Romney v. Lin*, 105 F.3d 806 (2d Cir. 1997).

5. IFIC also cites to decisions from lower Federal District and State courts which allegedly support its theory. As these cases are not decisions of a United States Court of Appeals or a state court of last resort, we submit they do not meet the Considerations of Rule 10 of the Rules of the Supreme Court and do not warrant extensive briefing.

universally been recognized as triggering preemption as they have a clear "connection with or reference to" ERISA benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 2899-2900, 77 L. Ed. 2d 490 (1983); *See De Buono*, 117 S. Ct. at 1751. On this basis alone, the cited cases are clearly distinguishable from the cases relied upon by the New Jersey Supreme Court which dealt with statutes of **general applicability.** Second, consistent with basic conflict preemption analysis, the New Jersey Supreme Court in the instant case, and the cases upon which it relied, expressly found that the Bond Act **did not conflict with ERISA enforcement mechanisms.** A. 16. Lastly, and paramount, IFIC's legal conclusion stands contrary to the starting presumption (emphasized by this Court in *Travelers, Dillingham* and *De Buono*), that Congress does not intend to supplant state law particularly in fields of traditional state regulation.

IFIC cites to the Ninth Circuit decision of *Trustees of the Electrical Workers Health and Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992) and a decision affirmed by the Ninth Circuit in 1993, *Puget Sound Electrical Workers Health and Welfare Trust Fund v. Leaf Corp., Inc.*, 1991 WL537068 (S.D. Wash. 1991), *aff'd*, 5 F.3d 539 (9th Cir. 1993) as creating a conflict among the Federal Circuit Courts which this Court must resolve. To the extent that a conflict of authoritative precedent existed in 1992 and 1993, we submit that this Court has directly resolved same and provided guidance to the Federal Courts of the Ninth Circuit in *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, __ U.S. __, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) by reversing the decision of the Ninth Circuit below. This Court stated therein:

> . . . Rather, to determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that

> Congress understood would survive as well as to the nature of the effect of the state law on ERISA plans.
>
> As is always the case in our preemption jurisprudence, where federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the assumption that the historic police posers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

(Citations omitted). 117 S. Ct at 838. We submit that the cases relied upon by IFIC must be reexamined in light of this Court's guidance in *Dillingham, Travelers* and *De Buono.*

C. The New Jersey Supreme Court's Decision is Consistent With Decisions of Numerous State Courts.

The New Jersey Supreme Court cited numerous state court decisions from Connecticut, Hawaii, Indiana and Pennsylvania which found no preemption of claims for employee fringe benefits in circumstances similar to those presented in the instant case. A.13.

The Indiana Court of Appeals, in *Seaboard Surety Company v. Indiana State District Council of Laborers, et al.*, 645 N.E. 2d 1121 (Ind. Ct. App. 1995), held that an action to collect on a bond written pursuant to the Indiana Public Works Statute was not pre-empted by ERISA and that recovery on such bonds affected employee benefit plans in "too tenuous, remote, and peripheral a manner" to warrant a finding that they "relate to" such a plan. *Id.* at 1127. The matter before the court was substantially identical to the instant case; the plaintiff/Benefit

Funds sought to recover delinquent fringe benefit contributions under surety bonds issued by defendant/Surety. The bonds were issued pursuant to an Indiana statute similar to the Bond Act, both which require the issuance of payment and performance bonds on public works projects. Neither the Indiana statute nor the Bond Act referred to ERISA benefit plans, nor singled them out for special treatment. *Id.* at 1127. In permitting the Benefit Funds to maintain their state law action, the Court noted that the statutory bond requirement and recovery against those bonds were "traditional exercises of state authority." *Id.*

The surety in *Seaboard*, like IFIC, asserted that the bond statute must be preempted as it impermissibly impacted on ERISA's enforcement scheme. After extensive analysis of ERISA's enforcement scheme, the Indiana Court of Appeals rejected the argument stating,

> We conclude that the enforcement scheme and extensive remedies of ERISA discussed by the Court in *Pilot Life* [*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)] and *Russell* [*Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)] refer only to a beneficiary's remedies against the plan and that a state law will not automatically be pre-empted because it provides a supplemental remedy to collect delinquent contributions . . .

Id. at 1124.

The United States Supreme Court recently denied review of Hawaii's State Supreme Court ruling that use of the state's lien law to assist in collecting judgment for delinquent ERISA trust fund contributions was neither expressly nor impliedly preempted by ERISA. *Hawai'i Laborers' Trust Funds v. Maui*

Prince Hotel, 81 Hawai'i 487, 918 P.2d 1143 (1996), *cert. denied*, __ U.S. __, No. 96-1651, 6/30/97. The Hawaii Supreme Court noted the same concerns that this United States Supreme Court has emphasized in *Travelers, Dillingham* and *De Buono*: (1) the Hawaii statute was "general" in nature and did not single out ERISA plans; (2) the statute did not conflict with ERISA's enforcement scheme; and (3) the statute dealt with issues traditionally within the state police powers. *Id.* at 1155-1157. After an analysis of legislative history, the court further noted:

> . . . it is apparent that Congress, having declared that effective collection of employer contributions by multiemployer plans to be an important policy concern of ERISA, did not intend to deny employee benefit plans access to state enforcement tools to collect delinquent contributions.

(Citations omitted). *Id.* at 1166. *See also Eacott v. Insurance Co. of North America*, 40 Conn. App. 777, 673 A.2d 587 (1996) (Following *Travelers, Greenblatt* and *Bleiler,* the court held that ERISA did not preempt Trustees' claims to recover contributions pursuant to labor and material payment bond); *Carpenters Local 261 Health & Welfare Fund v. National Union Fire Ins.*, 686 A.2d 1373 (Pa. Commw. Ct. 1996) (Pennsylvania's Public Works Contractors' Bond Law was not preempted by ERISA, therefore surety was obligated under surety bonds to make benefit contributions). A.13.

While the New Jersey Supreme Court recognized decisions from state courts which found ERISA preemption under various circumstances, the court found these cases distinguishable, generally because the laws at issue specifically named ERISA plans, or the laws at issue created additional causes of action

against parties that have no contractual obligation to ERISA plans. A.13-14.[6, 7]

II.

BECAUSE A SURETY'S LIABILITY IS GOVERNED PURELY BY STATE LAW, IFIC'S "QUESTION PRESENTED" INACCURATELY CONCLUDES THAT A SURETY CANNOT BE LIABLE FOR UNPAID CONTRIBUTIONS.

Respondent objects to IFIC's phrasing of the "Question Presented" as it inaccurately concludes that "the Employee Retirement Income Security Act of 1974 ("ERISA") provides that only an employer can be liable for unpaid contributions to union pension and benefit funds . . ."

We agree with IFIC's basic premise that federal claims created by ERISA (29 U.S.C. § 1132) are limited to "employers" pursuant to 29 U.S.C. § 1145[8], and that the weight of precedence

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6. *Puget Sound Elec. Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wash. 2d 565, 870 P.2d 960 (1994); *Carpenters Southern Cal. Administrative Corp. v. El Capitan Dev. Co.*, 53 Cal. 3d 1041, 282 Cal. Rptr. 277, 811 P.2d 296, *cert. denied*, 502 U.S. 963, 112 S. Ct. 430, 116 L. Ed. 2d 450 (1991); *Prestridge v. Shinault*, 552 So. 2d 643 (La. Ct. App. 1989), *writ denied*, 559 So. 2d 131 (La. 1990).

7. IFIC also cites to decisions from lower state courts which allegedly create a conflict with the New Jersey Supreme Court's decision. As these cases are not decisions from state courts of last resort, we submit they do not meet the considerations of Rule 10 of the Rules of the Supreme Court and do not warrant extensive briefing.

8. An employer under ERISA is defined as:

> any person acting directly as an employer, or indirectly (Cont'd)

has rejected efforts to bring sureties within the purview of ERISA. IFIC's self-serving legal conclusion that it therefore escapes all state governed liability is without legal basis.

The role of sureties in the context of ERISA has been examined by numerous courts which held that sureties cannot be considered "employers" as defined in ERISA § 1002(5) because there is no ownership or agency relationship between surety and employer, but only a contractual relationship by which the surety guarantees payment of a certain sum if the contractor defaults on its obligations. *Greenblatt v Delta Plumbing & Heating Corp.*, 68 F.3d 561, 575-576 (2d Cir. 1995); *Bleiler v. Cristwood Contr. Inc.*, 72 F.3d 13, 14 (2d Cir. 1995); *Ragan v. Tri-county Excavating, Inc.*, 62 F.3d 501, 512 (3d Cir. 1995); *Giardiello v. Balboa Insurance Co.*, 837 F.2d 1566, 1569 (11th Cir. 1988); *Xaros v. U.S.F.& G.*, 820 F.2d 1176, 1179 (11th Cir. 1987). From this legal premise, the courts have held that a surety's "obligations are fixed by contract and regulated by state law for the protection of the public." *Xaros*, 820 F.2d at 1179; *Ragan*, 62 F.3d at 512; *Giardiello*, 837 F.2d at 1569.

In its presentation of its "Question Presented," IFIC advocates self-immunity from state law and from the express language of its own surety bonds. In rejecting IFIC's argument, the New Jersey Supreme Court noted the "illogic" of finding that Congress intended to preempt a state law without providing any correlative federal standards. A.7. We submit that IFIC's argument is unfounded and adopt the position of the United

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(Cont'd)

> in the interests of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5).

States District Court for the District of Vermont under similar circumstances:

> The Court can find no case which takes the position that [the surety] would have this Court adopt: state law actions to recover ERISA benefits from sureties are pre-empted by ERISA, yet ERISA actions themselves provide no chance of recovery because sureties are not "employers."
>
> In essence, [the surety] would like the Court to engage in a "heads, I win — tails, you lose" analysis; pre-empting any state law cause of action and yet denying any possible recovery under ERISA as well. This the Court will not do.

Local 538, United Brotherhood of Carpenters and Joiners of America v. United States Fidelity and Guaranty Company, Docket No. 2:93-CV-59, at p.18, n.10 (D. Vt. 1994).

CONCLUSION

For the reasons set forth above, respondent Board of Trustees of Operating Engineers Local 825 Fund Service Facilities respectfully submits that the Petition of International Fidelity Insurance Company for a Writ of Certiorari should be denied.

Respectfully submitted,

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